



Interpretive Letter #1163
April 2019

April 5, 2018

Re: Request for No-Objection – Availability of 12 CFR 16.5 Exemption

Dear []:

This is in response to your letter dated January 24, 2018, and related communications, concerning a proposed security offering by [**Bank1**] (Bank). [**Bank1**] proposes to issue unregistered shares of common stock in connection with a merger with [] (Bank2). [**Bank1**] proposes to rely on the registration exemptions set forth in 12 CFR 16.5 and section 3(a)(10) of Securities Act of 1933 (Securities Act) for this transaction.¹ Based on the representations and information provided, including the legal opinion offered under 12 CFR 16.30, the Office of the Comptroller of the Currency (OCC) does not object to the bank's proposal.²

Proposed Merger

Your letter represents that [**Bank1**] intends to acquire [**Bank2**] by merging [**Bank2**] with and into [**Bank1**]. Under the proposed merger, [**Bank1**] would pay approximately \$43.1 million as consideration for all outstanding shares of [**Bank2**]'s common stock. The consideration would comprise 50% cash and 50% [**Bank1**] stock. The [**Bank1**] stock issued as consideration for the merger would not be registered under 12 CFR part 16. In addition, [**Bank1**] represents that it would pay cash to cancel all in-the-money [**Bank2**] stock options, to resolve any dissenters' rights, and to resolve any fractional shares. The proposed merger is subject to the approvals of the shareholders of [**Bank1**] and [**Bank2**] and the prior approval of the OCC as the primary federal banking regulator of [**Bank1**].

Exemption from Registration under 12 CFR 16.5

Twelve CFR 16.5(a) provides an exemption from the registration requirements in 12 CFR 16.3 and 16.15 for the offer or sale by a national bank of any securities that are exempt from registration under section 3 of the Securities Act, excluding the exemptions under sections 3(a)(2), 3(a)(5), 3(a)(11), and 3(a)(12) of the Securities Act. Your letter represents that [**Bank1**] would rely on the exemption in section 3(a)(10) of the Securities Act for this transaction.

¹ 15 USC 77c(a)(10).

² We understand [**Bank1**] will seek all appropriate licensing and other required regulatory approvals in conjunction with the proposed merger. This letter addresses only the exemptive treatment under 12 CFR 16 as described.

Section 3(a)(10) of the Securities Act exempts from registration “any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval.”³

Your letter represents that the exchange of shares and cash for **[Bank2]** shares under the proposed merger would meet section 3(a)(10) of the Securities Act’s requirement that the exchange be, at most, “partly for cash.” The relevant Securities and Exchange Commission (“SEC”) staff bulletin provides that transactions under section 3(a)(10) of the Securities Act must be “predominantly exchanges” and that the “partly for cash” language is intended to provide flexibility.⁴ The bulletin further provides that an analysis of whether an exchange is “partly for cash” is necessarily fact-specific.⁵ The bulletin therefore declined to provide specific guidance on the issue and recommended that issuers seek a no-action letter if it is unclear whether a transaction is “partly for cash.”⁶ In this vein, SEC staff have issued no-action letters under section 3(a)(10) of the Securities Act for merger transactions where more than 50% of the consideration paid by the acquirer was cash.⁷

Your letter further represents that the exchange under the proposed merger would meet all other requirements in section 3(a)(10) of the Securities Act. In particular, your letter states that a fairness hearing would be conducted.⁸ Your letter also states that this hearing would be conducted by a governmental authority expressly authorized by law to approve the terms and conditions of the exchange [].⁹ Finally, your letter states that the holders of **[Bank2]** common stock would receive notice of and would have the right to appear at the hearing.

³ 15 USC 77c(a)(10).

⁴ See Staff Legal Bulletin No. 3, (Oct. 20, 1999), as amended by Staff Legal Bulletin No. 3A (June 18, 2008).

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., SC Acquisition Corp., SEC No-Action Letter (Jul. 10, 1996) (providing no-action relief under section 3(a)(10) for a merger where the shareholders of the acquired company received a combination of 40% stock and 60% cash); Constellation Brands Inc., SEC No-Action Letter (Jan. 29, 2003) (providing no-action relief under section 3(a)(10) for an acquisition where shareholders could elect to receive shares or cash and shares would amount to, at most, 30% of total consideration paid).

⁸ The governmental entity that conducts the hearing must find the terms and conditions of the exchange to be procedurally and substantively fair. See Staff Legal Bulletin No. 3, (Oct. 20, 1999), as amended by Staff Legal Bulletin No. 3A (June 18, 2008).

⁹ []

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Conclusion

Based on your representations and submissions, the OCC does not object to **[Bank1]**'s proposal to issue unregistered shares as part of the proposed merger with **[Bank2]** in reliance on the exemptions from registration in 12 CFR 16.5(a) and section 3(a)(10) of the Securities Act.

This no-objection is based on the representations in your letter and supporting documents and the facts described in this letter. Any different representations, conditions, facts, or circumstances might require us to reach a different conclusion. If you have additional questions, please contact Mark O'Horo, Attorney, Securities and Corporate Practices Division, at 202-649-5510.

Sincerely,

/s/

Karen Solomon
Acting Senior Deputy Comptroller and Chief Counsel
Office of the Comptroller of the Currency